(2)

No. 91-1498

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK ALTAMORE,

Petitioner,

vs.

NEWSDAY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK SUPREME COURT
APPELLATE DIVISION – FOURTH DEPARTMENT

BRIEF FOR RESPONDENT NEWSDAY, INC. IN OPPOSITION

BRADFORD W. COUPE
(Counsel of Record)
AMBER KAGAN
MORGAN, LEWIS & BOCKIUS
Attorneys for Newsday, Inc.
101 Park Avenue
New York, New York 10178
(212) 309-6194

Date: April 14, 1992

QUESTIONS PRESENTED

1. Whether Petitioner, the grievant in an arbitration proceeding who was not a party to the collective bargaining agreement or the arbitration, has standing to bring this action challenging the arbitrator's adverse award?

2. Whether the award of the arbitrator upholding Petitioner's discharge conflicts with a dominant and well-defined public policy against disability discrimination in the workplace?

3. Whether the arbitrator exceeded his authority under the collective bargaining agreement in upholding the discharge of the Petitioner?

PARTIES TO THE PROCEEDINGS

A. The parties to the proceedings below all appear in the caption to this case.

B. Pursuant to this Court's Rule 29.1, Newsday, Inc. provides the following statement of parent companies and subsidiaries except for wholly-owned subsidiaries:

> Newsday, Inc. is a wholly-owned subsidiary of the Times Mirror Corporation. Newsday does not have any non wholly-owned subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
STATUTES AND REGULATIONS INVOLVED	6
STATEMENT OF THE CASE	7
A. Statement Of The Facts	7
B. The Proceedings Below	12
REASONS FOR DENYING THE WRIT	16
A. The Petitioner Was Not A Formal Party To The Collective Bargaining Agreement Or The Arbitration Proceeding and, Consequently, Has No Standing To Bring This Petition	17
B. Arbitrator House's Award Upholding Petitioner's Discharge Does Not Conflict With Any Dominant And Well-Defined Public Policy	21

C. Arbitrator House Did Not Exceed His Authority Under The Collective Bargaining Agreement In Upholding Petitioner's Discharge . 31

CONCLUSION 36

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Andrus v. Convoy Co.,
480 F.2d 604 (9th Cir. 1973) . . . 19

Bacashihua v. U.S. Postal Service,
859 F.2d 402 (6th Cir. 1988) . . . 18

Bankers Life & Casualty Co. v. Crenshaw,
486 U.S. 71 (1988) 4, 6

Board of Directors of Rotary Int'l v. Rotary Club of Duarte,
481 U.S. 537 (1987) 4, 6

Cook v. U.S. Dep't of Labor,
688 F.2d 669 (9th Cir. 1982),
cert. denied, 464 U.S. 832 (1983) . 28

Diaz v. Pilgrim State Psychiatric Center,
62 N.Y.2d 693, 476 N.Y.S.2d 525 (1984)
. 20

Doe v. New York University,
666 F.2d 761 (2d Cir. 1981) 28

Martin v. Youngstown Sheet & Tube Co.,
911 F.2d 1239 (7th Cir. 1990) . . . 18

McNair v. U.S. Postal Service,
768 F.2d 730 (5th Cir. 1985) . . . 18

Santiago v. Temple University,
739 F. Supp. 974 (E.D.P.A. 1990),
aff'd, 928 F.2d 396 (3d Cir. 1991) 29

Serrapica v. City of New York,
708 F. Sup. 64 (S.D.N.Y. 1989),
aff'd, 888 F.2d 126 (1989) 29

Southeastern Community College v. Davis,
442 U.S. 397 (1979) 28

Steelworkers v. Enterprise Wheel & Car Corp.,
363 U.S. 593 (1960) 32, 33

Steelworkers v. American Mfg. Co.,
363 U.S. 564 (1960) 36

United Paperworks Int'l Union v. Misco,
484 U.S. 29 (1987) . . 23, 26, 30, 31
33, 34

Vosch v. Werner Continental, Inc.,
734 F.2d 149 (3d Cir. 1984) 19

Webb v. Webb,
451 U.S. 493 (1981) 4, 5

W.R. Grace & Co. v. Int'l Union of United Rubber Workers, Local 759,
461 U.S. 757 (1983) 34

STATUTES

42 U.S.C. 12111, 1211 . . 6, 21, 24, 25
26, 27, 30

29 U.S.C. § 794 . . . . . 6, 21, 25
26, 27, 30

29 U.S.C. § 185 . . . . . 5, 6, 19

28 U.S.C. § 1257(a) 3

N.Y. Exec. Law § 296 et. seq 7, 22, 30

N.Y. Civ. Prac. L. & R. §7511 7

MISCELLANEOUS

29 C.F.R. § 1615.101 et. seq . . . 26

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-1498

FRANK ALTAMORE,

Petitioner,

v.

NEWSDAY, INC.,

Respondent.

On Petition For Writ Of Certiorari To
The New York Supreme Court
Appellate Division - Fourth Department

BRIEF FOR RESPONDENT NEWSDAY, INC. IN OPPOSITION

Respondent Newsday, Inc. ("Newsday" or "Respondent") respectfully requests that the Petition for Writ of Certiorari of Petitioner, Frank Altamore (the "Petitioner"), to review the judgment of the New York Supreme Court Appellate Division - Fourth Department be denied.

OPINIONS BELOW

The opinions of the New York State Supreme Court, Nassau County ("New York Supreme Court") and the New York Supreme Court Appellate Division, Fourth Department ("Appellate Division"), which are reprinted in the Petitioner's Appendix, are not reported. The Appellate Division's Order denying Petitioner's Motion for Leave to Appeal to the New York Court of Appeals is available on Lexis at 1991 N.Y. App. Div. Lexis 14039 (4th Dep't. 1991). The New York Court of Appeal's Order denying Petitioner's Motion for Leave to Appeal is reported at 79 N.Y.2d 751 (1991).

JURISDICTION

Petitioner invokes the federal question jurisdiction of this Court under 28 U.S.C. § 1257(a) which states: "[f]inal judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the . . . statutes of . . . the United States." Pursuant to this provision and Rule 14.1(h) of the Rules of this Court, Petitioner must raise a timely and proper federal question in the State Court proceedings as a prerequisite to

seeking this Court's review. See Webb v. Webb, 451 U.S. 493 (1981) (this Court is without jurisdiction to hear a federal question that was not properly raised in the state proceedings); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (it is well settled that this Court will not review a final judgment of a state court unless the federal claim was adequately presented in the state system); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (same).

Contrary to Petitioner's assertion, he failed to properly present a federal question in the state proceedings. Although Petitioner could have moved to vacate the arbitrator's award

under § 301 of the Labor-Management Relations Act, thereby creating a federal issue, he did not do so.[1/] Rather, Petitioner moved to vacate the award only under Section 7511 of the New York Civil Practice Laws and Rules ("CPLR"). The State Courts decided the vacatur issues under that statute and applicable state court precedent, and nowhere addressed or purported to apply federal law. Accordingly, this Court should dismiss this petition for a writ of certiorari for Petitioner's failure to properly invoke this Court's federal question jurisdiction. See Webb, 451

1/ Indeed, Petitioner has failed to cite Section 301 in his Petition before this Court as the relevant federal statute, as is required under this Court's Rule 14.1(f).

U.S. at 495 (when the highest state court fails to pass upon a federal question, it is assumed that the issue was not properly presented in the state courts); Rotary Club of Durante, 481 U.S. at 550; Bankers Life & Casualty Co., 486 U.S. at 72.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the following statutes are set forth in the Appendix hereto:

Section 301 of the Labor-Management Relations Act,
29 U.S.C. § 185;

The Americans with Disabilities Act of 1990,
42 U.S.C. § 12101 et. seq.;

The Rehabilitation Act of 1973,
29 U.S.C. § 701 et. seq.;

The New York Human Rights Law, N.Y. Exec. Law § 296 et. seq.; and

Section 7511 of the New York Civil Practice Laws and Rules.

STATEMENT OF THE CASE

A. Statement of the Facts

Respondent and the Long Island Typographical Union No. 915 are parties to a collective bargaining agreement covering Newsday's Composing Room employees. In 1972, Newsday hired Petitioner to work as a printer in its Composing Room, where he was actively employed until April of 1977. In that month, he became afflicted with a seriously disabling condition that

forced him to stop work and to take a leave of absence.

Petitioner was diagnosed, by his own physicians, to be "totally disabled". (R. 19).[2/] On August 29, 1984, Respondent wrote to Petitioner noting that more than two years had passed since its last correspondence with him on July 19, 1982, at which time Petitioner had stated that he expected to return to work in the near future. Newsday told Petitioner that it might be forced to terminate his employment unless he agreed to submit to a complete physical examination by an independent physician. (R. 21).

2/ References to the record on appeal to the Appellate Division will be cited in this fashion.

Petitioner responded to Newsday by submitting a letter from his neurologist again stating that Petitioner was "totally disabled." (R. 21). Thereafter, Petitioner agreed to be examined by an independent neurologist recommended by Newsday's medical consultant. (R. 21). This neurologist, Dr. Ronald Houseman, diagnosed Petitioner as being permanently and totally disabled. (R. 22). In light of this diagnosis, Newsday terminated Petitioner's inactive employment on July 31, 1985. At that point, Petitioner had been on disability leave continuously for a period of eight years and three months.

The Union filed a grievance on Petitioner's behalf challenging the

termination of his employment and, under the collective bargaining agreement between Newsday and the Union, pursued his grievance through arbitration.

Arbitrator Daniel House was chosen by the Union and Newsday to hear and decide the dispute. After twelve days of hearing, Arbitrator House concluded that up to the time of Petitioner's discharge, neither his own doctor nor an independent neurological specialist "reported finding anything other than that [Petitioner] was permanently and totally disabled . . . ." (R. 19). Moreover, Arbitrator House noted that subsequent to his termination, the Petitioner's own physician, Dr. Morris

Dickman, had confirmed Dr. Houseman's diagnosis. (R. 22). The Arbitrator held that Newsday did not violate the collective bargaining agreement by terminating Petitioner's inactive employment because under the parties' agreement, "'neglect of duty' includes being unable to report for and perform any of the normal work which might be available for assignment, even if the disability to do so is not the fault of the [Petitioner]." (R. 23).[3/]

3/ In his Petition for Writ of Certiorari, Petitioner fails to provide references to the record in support of his recitation of the facts. In several instances, Petitioner recites "facts," such as evidence concerning other employees' disabilities, that are not contained in the record of the State Court proceedings or of the

(continued...)

B. The Proceedings Below

On July 21, 1987, Petitioner commenced this action in the New York State Supreme Court of Nassau County to set aside Arbitrator House's arbitration award under the New York Civil Practice Laws and Rules Section ("CPLR") 7511. Petitioner did not raise his public policy argument at that time.

On October 16, 1987, the Honorable Angelo D. Roncallo dismissed Petitioner's motion to vacate the award. Justice Roncallo held that "Petitioner

---

3/(...continued)
arbitration and which, therefore, should not be considered.

was the grievant in [the arbitration] proceeding; he was not a formal party; Newsday and the Union were the only parties to the [collective bargaining] contract on which the arbitration was predicated. An arbitration award pursuant to such an agreement may be vacated only at the instance of one of those two parties." Petition at A-5. Additionally, Justice Roncallo held that the court had "no authority to review errors of fact or law made by an Arbitrator, and render a decision de novo on the merits." Finally, he concluded that Petitioner's motion did not fall within one of the limited grounds for vacatur set forth in CPLR 7511. Thereafter, Petitioner moved to reargue

Justice Roncallo's order, which motion was denied on December 15, 1987. Petition at A-5.

On March 15, 1990, after unsuccessfully attempting to appeal the denial of his motion to reargue for over two years, Petitioner filed a Notice of Appeal to the New York Supreme Court Appellate Division, Second Department.[4/] In this appeal, Petitioner raised his public policy argument for the first time. On July 12, 1991, the Appellate Division issued a Decision and Order unanimously affirming the lower court's decision on

---

4/ In May 1991, the appeal was transferred to the New York Supreme Court Appellate Division, Fourth Department.

the basis that Arbitrator House's award was not irrational, in excess of his authority or in violation of any public policy. Petition at A-4. However, in its memorandum decision, the Appellate Division held that the Petitioner did have standing to challenge the arbitration award. Petition at A-4.

On July 30, 1992, Petitioner moved in the Appellate Division for leave to appeal to the New York State Court of Appeals, which motion was denied on October 4, 1991. Thereafter, on October 30, 1991, Petitioner moved in the New York Court of Appeals for leave to appeal. This motion was denied on December 19, 1991.

REASONS FOR DENYING THE WRIT

This matter does not raise issues appropriate for the exercise of this Court's discretionary review by certiorari. In that regard, the Appellate Division's decision does not present an important question of federal law yet to be decided by this Court. Moreover, except for the Appellate Division's erroneous conclusion that Petitioner has standing to challenge the arbitrator's award, which would, if reversed, require Petitioner's Writ to be denied, the decision does not conflict with any decision of this Court or with opinions of the United States Courts of Appeals. Rather, the Appellate

Division's decision presents a fact-specific application of settled principles of law. Petitioner is not questioning the legal principles applied by the State Courts, but is seeking in this Petition, as he did in the state proceedings, to reargue the factual findings of Arbitrator House. Thus, there are no grounds that warrant granting the instant Petition.

A. The Petitioner Was Not A Formal Party To The Collective Bargaining Agreement Or The Arbitration Proceeding And, Consequently, Has No Standing To Bring This Petition.

It is well established that when a union and an employer are parties to a collective bargaining agreement which

contains a grievance procedure that gives the union the exclusive right to pursue claims on behalf of aggrieved employees, an individual grievant lacks standing to vacate an arbitration award rendered pursuant to that agreement. Indeed, the Circuit Courts have consistently refused to permit employees whose employment is governed by such agreements to independently attack adverse arbitration awards, unless such employees have also claimed that their union breached its duty of fair representation. See Martin v. Youngstown Sheet & Tube Co., 911 F.2d 1239 (7th Cir. 1990); Bacashihua v. U.S. Postal Service, 859 F.2d 402 (6th Cir. 1988); McNair v. U.S. Postal Service, 768 F.2d

730 (5th Cir. 1985); Vosch v. Werner Continental, Inc., 734 F.2d 149 (3d Cir. 1984), cert. denied, 469 U.S. 1108 (1985); Andrus v. Convoy Co., 480 F.2d 604 (9th Cir.), cert. denied, 414 U.S. 989 (1973).[5/]

The New York Supreme Court, applying an analysis that is consistent with federal law, correctly held that Petitioner was not a party to the collective bargaining agreement or the arbitration proceeding and, therefore, had no standing to vacate the award. The Appellate Decision, relying upon a

---

5/ In the instant case, the Petitioner has not and cannot claim that the union breached its duty of fair representation under Section 301 of the Labor-Management Relations Act.

single decision in which both the union and individual grievants had the right to pursue grievances under the collective bargaining agreement, reversed. See Diaz v. Pilgrim State Psychiatric Center, 62 N.Y.2d 693, 476 N.Y.S. 2d 525 (1984). The Diaz result is an exception only because the controlling contract language expressly conferred upon grievants the right that settled State Court precedent and the federal common law deny in traditional labor-management contractual settings. Since, in the collective bargaining agreement before the Court, the union has the exclusive right to pursue grievances on behalf of individual grievants, Diaz is inapposite and the

Appellate Division's holding on the standing issue is in direct conflict with the settled law. Thus, Petitioner has no standing to bring this Petition and it should be dismissed.

B. Arbitrator House's Award Upholding Petitioner's Discharge Does Not Conflict With Any Dominant And Well-Defined Public Policy

The Petitioner asserts that Arbitrator House's award violates a public policy against disability discrimination in the workplace and, therefore, that the award should have been vacated by the State Courts. In support of this argument, Petitioner relies upon the Americans with Disabilities Act of 1990 (the "ADA") and the Rehabilitation

Act of 1973 (the "Rehabilitation Act").[6/]

6/ The Petitioner raised his public policy argument for the first time in his appeal to the Appellate Division. At that time, Petitioner claimed that Arbitrator House's award was in violation of the New York Human Rights Law and, therefore, violative of the public policy of the state of New York. Almost as an afterthought, Petitioner "noted that the United States Congress has recently extended the protection afforded individuals under 42 U.S.C. Section 1981 et. seq. and Section 2000e et. seq. to the disabled. Petitioner need not go any further in discussing this issue." Petitioner's ambiguous reference to a Congressional action is not supported by citation nor is it clear that the measure to which he refers was or ever became law. Neither the ADA nor the Rehabilitation Act were cited at that time or at any time thereafter.

Under the two-pronged test announced by this Court in United Paper works Int'l Union v. Misco, 484 U.S. 29 (1987), an arbitrator's award may be vacated only if: (1) the public policy allegedly involved is well-defined and dominant, as ascertained by reference to laws and legal precedents; and (2) the award creates an "explicit conflict" with such policy. Misco, 484 U.S. at 43. In the instant case, Petitioner has failed to meet either prong of this analysis.

Petitioner cites two federal statutes and a part of the Code of Federal Regulations ("CFR") in support of the first prong of the Misco analysis, that a well-defined and dominant public

policy exists. However, these federal statutes and regulations were never raised by Petitioner in the state courts in support of his public policy arguments there and, in any event, they are not applicable to the instant case. First, the ADA, which was signed by President Bush in July 1990, was not effective at the time of Arbitrator House's award, at the time Petitioner moved to vacate the award in the New York State Supreme Court, or at that time Petitioner appealed the New York Supreme Court's decision to the Appellate Division. Indeed, the relevant Title of the ADA, Title I, which prohibits discrimination on the basis of disability in private employment, is

not effective until July 26, 1992. Thus, the ADA was not "law" at the relevant times and cannot be cited now as the source of a well-defined public policy in the instant case.

Second, the Rehabilitation Act, which prohibits discrimination on the basis of handicaps, only applies to recipients of federal grants, programs conducted by executive agencies, and the United States Postal Service. 29 U.S.C. § 794 (1973). Thus, the public policy against handicap discrimination, as ascertained by reference to the Rehabilitation Act, applies only to those specifically enumerated entities. Since Respondent does not fall into any of the covered categories, the Rehabil-

itation Act is inapplicable and, consequently, cannot serve as the manifestation of public policy in this case.7/

Even assuming that the ADA and the Rehabilitation Act were appropriate sources of public policy in the instant case, Petitioner has failed to establish that Arbitrator House's award creates an explicit conflict with those policies, as is required under the second prong of the Misco analysis. The ADA and the Rehabilitation Act

---

7/ Similarly, the part of the C.F.R. cited by Petitioner prohibits handicap discrimination in programs or activities conducted by the Equal Employment Opportunity Commission. 29 C.F.R. § 1615.101 et. seq. Thus, this expression of public policy has no application to the present case.

protect individuals with disabilities or handicaps from invidious discrimination based on their disabilities, but do not protect against adverse personnel actions. They protect only those disabled persons who are otherwise qualified to perform the job in question.

Section 102 of the ADA prohibits discrimination against a "qualified individual with a disability," which is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position. 42 U.S.C. § 12111, 12112. Similarly, Section 504 of the Rehabilitation Act prohibits discrimination

against an "otherwise qualified individual with handicaps." 29 U.S.C. § 794. The Courts have consistently interpreted the phrase "otherwise qualified individual" to exclude those persons whose handicaps prevent them from performing the job requirements. See Southeastern Community College v. Davis, 442 U.S. 397 (1979) ("an otherwise qualified individual is one who is able to meet all of a program's requirements in spite of his handicap"); Cook v. U.S. Dept of Labor, 688 F.2d 669 (9th Cir. 1982), cert. denied, 464 U.S. 832 (1983) (Section 504 of the Rehabilitation Act only protects handicapped individuals who are able to adequately perform the job); Doe v. New

York University, 666 F.2d 761 (2d Cir. 1981) (an otherwise qualified individual is one who is qualified in spite of her handicap) Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y.), aff'd, 888 F.2d 126 (1989) (handicapped individual must be capable of meeting all of an employer's qualifications); Santiago v. Temple University, 739 F. Supp. 974 (E.D.P.A. 1990), aff'd, 928 F.2d 396 (3d Cir. 1991) (same).

In the present case, Arbitrator House specifically found that the Petitioner suffered from a permanent disability which rendered him unable to report for and to perform any of the normal work which might be available for assignment. Since Arbitrator

House's findings of fact cannot be rejected by the courts, Misco, 484 U.S. at 38, the undisputed facts establish that petitioner was not otherwise qualified for his position with Respondent. Thus, Petitioner would not be protected under the ADA or the Rehabilitation Act and Arbitrator House's award upholding Petitioner's discharge did not create an explicit conflict with the public policy against disability discrimination, as referenced by the ADA and the Rehabilitation Act.[8/] Accordingly, the Appellate Court's refusal to vacate

---

8/ The same result is reached under the New York Human Rights Law, which also protects only those disabled individuals who are able to reasonably perform their jobs. See N.Y. Exec. Law § 296 et. seq.

his award is in complete accord with this court's decision in Misco.

C. Arbitrator House Did Not Exceed His Authority Under The Collective Bargaining Agreement In Upholding Petitioner's Discharge

Petitioner also contends that the Appellate Division's refusal to vacate Arbitrator House's award, on the ground that he exceeded his authority, is in conflict with the decisions of this Court. Petitioner does not assert that the Appellate Division applied the wrong legal standard. Rather, Petitioner states that Arbitrator House imposed a remedy that "directly contradicts the express language of the collective bargaining agreement" and dis-

pensed his own brand of industrial justice. Peitition at 12. The essence of Petitioner's argument is that Arbitrator House wrongly interpreted the collective bargaining agreement. Petitioner's argument conflicts with this Court's settled standard for review of arbitrators' awards and provides no basis for granting this writ.

This Court has consistently held that a court's role in reviewing arbitration awards is limited. Courts do not have the authority to reconsider the merits of an arbitration award even if the award rests on errors of fact or on a misinterpretation of the contract. Misco, 484 U.S. at 36; Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S.

593 (1960). The parties have authorized the arbitrator to interpret the language of the contract, and this interpretation may not be rejected on the ground that the arbitrator misread the agreement. Misco, 484 U.S. at 38. Thus, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a Court is convinced he committed serious error does not suffice to overturn his decision." Misco, 484 U.S. at 38. Indeed, unless an arbitrator acts in excess of his authority and renders an award that does not draw its essence from the contract, the award may not be vacated. See Steelworkers, 363 U.S. at 596-97;

W.R. Grace & Co. v. Int'l Union of United Rubber Workers, 461 U.S. 757, 764 (1983); Misco, 484 U.S. at 36-38.

Petitioner concedes that the job security provision of the collective bargaining agreement permits the discharge of employees otherwise protected by that guarantee "for cause." He further acknowledges that "neglect of duty," the reason assigned by Respondent when it terminated Petitioner, is an expressly stated basis for discharge. Finally, he states that "neglect of duty" is not defined in the agreement. By these statements alone, Petitioner has demonstrated that in relying upon and interpreting this provision, Arbitrator House was at

least "arguably construing or applying the contract and acting within the scope of his authority."

In a vain effort to enlist the Court's aid, Petitioner here, as he did in the state courts, argues that a correct interpretation of "neglect of duty" can only be made by reference to a provision of a secondary document, the General Laws of the International Typographical Union, and even then only with the additional assistance of "past practice and usage." For the Court to engage in the interpretive exercise Petitioner suggests would necessarily cause the Court to substitute its judgment for that of the arbitrator against all of the principles the Court an-

nounced in Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) and has consistently followed since. Accordingly, the instant petition has not presented an issue appropriate for review and the writ should be denied.

CONCLUSION

For the foregoing reasons, Respondent Newsday, Inc. respectfully requests that Petitioner's Petition for a Writ

of Certiorari to the Court of Appeals

for the State of New York be denied.

Dated: New York, New York
April 14, 1992

Respectfully submitted,

BRADFORD W. COUPE
(Counsel of Record)
AMBER L. KAGAN
MORGAN, LEWIS & BOCKIUS
101 Park Avenue
New York, New York 10178
(212) 309-6000

APPENDIX

1. Section 301 of the Labor-Management Relations Act provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

2. Sections 101 and 102 of the Americans with Disabilities Act of 1990 provide in relevant part:

> § 101(8): The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

> § 102(a): No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §§ 12111(8), 12112(a)

3. Section 504 of the Rehabilitation Act provides in relevant part:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794

4. Section 7511 of the Civil Practice Law and Rules of the State of New York provides in relevant part:

> (a) An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.
>
> (b)(1) The award shall be vacated on the application of a party who either participated in the arbitration or served with the notice of intention to arbitrate if the court finds the rights of that party were prejudiced by:
>
> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral; except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) failure to follow the procedure of this article, unless the party planning vacate the award contin-

ued the arbitration with notice of the defect and without objection.

New York Civ. Prac. L. & R. § 7511

5. The New York Human Rights Law provides in relevant part:

> § 292(21): The term disability means . . . a physical, mental or medical impairment. . . which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sort or held.
>
> § 296(1)(a): It shall be an unlawful discriminatory practice for an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against

such individual in compensation or in terms, conditions, or privileges of employment.

§ 296(3-a)(g): But nothing contained in the subdivision [or] in subdivision one of this section . . . shall be construed to prevent the termination of the employment of any person who is physically unable to perform his duties . . . .